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Supreme Court, U.S.
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No. 93-1981

In The

Supreme Court of the United States

October Term, 1993

RESULTS, INC.,

Petitioner,

versus

LAVALCO, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

JOHN M. MADISON, JR.
MARK L. HORNSBY
WIENER, WEISS, MADISON & HOWELL
A PROFESSIONAL CORPORATION
Post Office Box 21990
Shreveport, Louisiana 71120-1990
Telephone: (318) 226-9100
Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

Respondent submits the real issues for review are:

1. Should this Honorable Court grant a Writ of Certiorari primarily to determine whether the trial court abused its discretion in denying a motion to compel when the trial court's factual findings moot Petitioner's arguments concerning the motion and when those factual findings are not clearly erroneous?

2. Should this Honorable Court grant a Writ of Certiorari to review the trial court's refusal to award any damages to Petitioner when Petitioner utterly failed to establish any liability, when the case presents only factual issues for review, and when none of the considerations relevant to a grant of a Writ of Certiorari is present?

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CITATIONS OF OPINIONS AND JUDGMENTS BELOW

Petitioner's Appendix includes only the trial court's Memorandum Ruling, the trial court's Judgment, and the Opinion of the Court of Appeals. All references by Respondent herein to those documents will contain a page reference to Petitioner's Appendix. Despite Petitioner's reference to other motions or rulings in its Petition, Petitioner did not include in its Appendix the trial court's rulings concerning: (1) Petitioner's Motion For New Trial; (2) Respondent's Motion For Summary Judgment; and (3) Petitioner's Oral Motion To Renew Motion To Compel.

INTRODUCTION

This is a straight-forward copyright infringement case presenting only factual issues for this Court's review. All of the arguments presented by Petitioner to this Honorable Court already have been presented to and firmly rejected both by the trial court and by the court of appeals. Petitioner seeks review by this Court, not because of any split in the circuits on an issue of national significance and not because of the presentation of an important question of federal law, but rather because Petitioner is dissatisfied with the factual findings of the trial court. Simply stated, there is no reason for this Honorable Court to consider this case only to review the trial judge's factual findings and credibility determinations. The Petition has no merit; it should be denied.

A. RELEVANT PROCEDURAL HISTORY

The trial court essentially held Lavalco ("Respondent") had the contractual right to modify and use the computer software programs developed by Respondent with the assistance of Results ("Petitioner") and Petitioner's predecessor. Respondent had paid Petitioner more than $460,000 for these rights, and the trial court's decision was clearly correct. In a Per Curiam opinion issued after oral argument, the United States Fifth Circuit Court of Appeals affirmed in all respects. Appendix at 16.

Petitioner filed this action *pro se* against Respondent in an attempt to set forth causes of action for copyright infringement, breach of contract, unfair competition and misappropriation of trade secrets. Respondent filed its Answer and Counterclaim seeking a declaratory judgment, an accounting, attorney's fees and damages, and return of certain trade secrets.

At a scheduling conference, the presiding magistrate judge dismissed Petitioner's claims for breach of contract and unfair competition, with prejudice, upon oral motion of Petitioner.

Written discovery was propounded by both parties, but only Respondent noticed any depositions. Petitioner did not depose any representatives, employees or computer programmers of Respondent.

Respondent subsequently filed a motion for partial summary judgment seeking dismissal of Petitioner's claims for punitive damages, misappropriation of trade secrets, and copyright infringement. In response to the motion for summary judgment, Plaintiff filed a motion to

compel, claiming that it needed certain files, programs and tapes to respond to the motion for summary judgment. Petitioner asks this Court to issue a writ of certiorari to review the trial court's denial of the Motion to Compel.

In a prior discovery request propounded to Respondent, Petitioner requested that Respondent produce:

> *All items* contained in the Master Dictionary of each user account on Lavalco's computer system along with *all* basic programs, procs and dictionaries called by or referred to in each of these accounts at or near the time of the modem disconnection, at the time of the initiation of this lawsuit, and as they are today, along with copies of magnetic media which contain basic programs, procs or dictionaries which have been removed from the system since modem disconnection. [Emphasis added.]

Respondent objected to Petitioner's discovery request on the ground that Petitioner clearly was not entitled to the sensitive and confidential trade secrets requested. The magistrate judge agreed with Respondent and held that Respondent "should not be required to reveal its sensitive computer programs until [Petitioner] had shown a need for them." The order permitted Petitioner to specify in its opposition to the motion for summary judgment precisely how the materials might be relevant to the issues presented. Petitioner did not comply. Although it clearly could have done so, Petitioner did not appeal the magistrate judge's order to the district judge.

In his Report and Recommendation, the magistrate judge granted (in part) Respondent's motion for summary judgment. The district judge adopted the Report and Recommendation over Petitioner's objections.

Petitioner's counsel orally re-urged the motion to compel at a subsequent status conference before the same magistrate judge. A briefing schedule was established by the court. However, Petitioner failed to file any additional briefs or written reasons in support of the renewed motion. Because Petitioner failed to file any briefs, the magistrate judge denied the renewed motion. Petitioner appealed *that* order to the district judge, and explained the basis of its claim against Respondent as follows:

> The gravamen of plaintiff's infringement claim is that it has lost the revenue to which it should be entitled from making any alterations to the programs in question. Plaintiff, as owner of the copyright, has the sole right to alter the programs. Defendant's admitted alterations infringe on this right. The ***measure of plaintiff's damages***, is, in large part dependent on the extent to which the programs have been modified, and the profit plaintiff would have realized if it had made the modifications. Plaintiff cannot possibly ***prove its damages*** without having the programs. [Emphasis added.]

Because the order was neither clearly erroneous nor contrary to law, the district judge affirmed. Petitioner prematurely filed a "Notice of Appeal" to the court of appeals. Petitioner's appeal was properly dismissed by that court for lack of jurisdiction.

Prior to trial, Petitioner also moved to bifurcate the trial in order to try the issues of ownership and damages separately. In the motion, Petitioner stated it ***could not prove its damages*** without Respondent's computer tapes. Alternatively, Petitioner moved to continue the trial to conduct additional written discovery. Both requests were properly denied by the district judge.

The district judge rendered his 19 page Memorandum Ruling in which he carefully analyzed the evidence and rejected Petitioner's claims. Petitioner moved the court for a new trial, which was denied by the district judge.

B. FACTUAL BACKGROUND

Respondent purchases and distributes industrial valves and fittings. Its inventory is large and changes frequently, as do its distribution methods and techniques.

In 1981, Respondent purchased from Tri-State Computer and its sister company, Delta Data, certain computer hardware and software programs *with the license or permission to modify the programs for Respondent's own use.* Respondent understood that after paying Delta Data and Petitioner for the programs, it owned the programs with the right to use and modify those programs to meet Respondent's changing needs. In fact, the only restriction placed on Respondent in the purchase documents was that Respondent could not refer to the programs modified by Respondent as a "Solutions" system without prior authorization from Delta Data.

The evidence at trial was overwhelming that all parties anticipated Respondent would continue to modify the programs to meet Respondent's changing needs. Indeed, at trial, Petitioner stipulated to Respondent's right to modify the Solutions programs further. It is also undisputed that in order to make further modifications to the programs, Respondent needed access to the program "source code," which at all times has been located on Respondent's computer. Indeed, Petitioner voluntarily placed the source code for all of the programs modified or written by Petitioner for Respondent on Respondent's computer.

Keith Grill ("Grill") was an independent contractor (and later an employee) of Delta Data when Respondent initially acquired the hardware and software from Tri-State Computer and Delta Data. While at Delta Data, Grill's duties included writing new programs and making modifications or enhancements to BOSS software programs for the use and benefit of Delta Data's clients, including Respondent. Delta Data had previously acquired certain rights to the BOSS software program from its owner. Grill did most of Delta Data's programming work for Respondent. As an independent contractor for and later as an employee of Delta Data, Grill put Delta Data's copyright notices on *all* work and modifications to BOSS performed for Delta Data, indicating copyright ownership in Delta Data. After Petitioner (Results, Inc.) was formed, Grill *deleted* the prior owner's copyright notices on modified programs and completely replaced them with Petitioner's copyright notices.

Brad Kimbrell ("Kimbrell"), also a Delta Data employee and close friend of Grill, and Grill formed

Results, Inc., a Louisiana corporation, on July 26, 1982 while still working as employees of Delta Data. At that time, Petitioner had no real assets. In 1982, Grill and Kimbrell began doing work in a spare office inside Respondent's premises. This was a change in physical location only. At that time, there were approximately 2,000 programs on Respondent's computer. Grill continued to perform the *same work* for Respondent as he had as an independent contractor and later as employee of Delta Data. He continued writing and modifying source code for Respondent as he did at Delta Data, with the only real differences being that Respondent paid Petitioner directly and Grill no longer was subject to the supervision of Delta Data.

During the course of the parties' relationship, the parties agreed upon a convention for noting modifications made to the programs by either Petitioner or Respondent. For example, when Respondent's in-house systems analyst and programmer, Jim Brown, substantially modified RESULTS.INPUT, the program which is the basis of Respondent's entire system and which is incorporated into every other program, he notified Petitioner. When an employee of Petitioner further modified a modification made by an employee of Respondent, Petitioner's employee notified Respondent. Grill (Petitioner) knew *all along* Respondent was modifying the programs. *In fact, Grill told Respondent's employees to modify the software.* He even prepared a training outline and distributed it to two of Respondent's employees, Jim Brown (a programmer employed by Respondent and trained by Grill) and Dean Anderson. Grill never told anyone at Respondent that Respondent could not make

modifications to the software. In fact, Grill never complained about Respondent's modifications until his inflow of cash from Respondent began to decrease.

Although Petitioner did not introduce *any* programs into evidence (obviously hoping to avoid judicial scrutiny concerning its illegal modifications to BOSS), Respondent did introduce into evidence several programs, both to demonstrate Respondent's contributions and to show the Court some of Petitioner's trivial modifications to BOSS which resulted in Petitioner's present claim of copyright infringement. *Amazingly, Petitioner never sought to introduce its modifications (or programs) into evidence or otherwise identify them for the Court.*

Just as Grill left Delta Data with expectations of becoming self-sufficient and independent, Respondent also had expectations of self-sufficiency and independence. In fact, Grill knew that Respondent was trying to become self-sufficient with its computer programs and system. Also, Grill was well aware that Respondent had programmers on staff who were working on these programs. Petitioner's expectations of independence were met with the receipt by Petitioner of almost half a million of Respondent's dollars; Respondent's expectations were met with this lawsuit.

The only written agreement between the parties was signed by Petitioner on February 1, 1989. That agreement, which is entitled "Confidentiality Agreement," was required by Respondent from Petitioner before allowing Petitioner to perform additional work. The agreement

defines Respondent's proprietary and confidential information as, among other things, Respondent's *computer programs* and data.

The parties did, however, have an oral agreement concerning the sharing of revenues from the sale to non-competitors of Respondent of certain Respondent programs written or modified with Petitioner's assistance. Certain software, including the package known as EMA (which was copyrighted by Petitioner) would be excluded from joint ownership and could not be sold by Petitioner to anyone. Respondent had veto rights over sales of the rest.

Consistent with Respondent's understanding, on January 18, 1984 Petitioner paid $1,250.00 to Respondent for Respondent's share of the proceeds from the sale of certain programs to a third party.

In 1984, Petitioner finally moved from Respondent's premises to an office in nearby Bossier City, Louisiana. Again, this was a change in location only. Grill (Petitioner) still performed the same function. Respondent still was Petitioner's major client. At that point, Petitioner had to access Respondent's computer by modem. Later, Respondent required Petitioner to telephone Respondent and request access to Respondent's computer by modem. *Id.* Finally, Respondent permanently disconnected the modem. That required Petitioner to bring physically to Respondent a magnetic tape containing Petitioner's changes (and source code). *Id.* Of course, Petitioner was paid well by Respondent for this work.

The turning point in the parties' relationship was the hiring by Respondent of Dean Anderson ("Anderson") in

June 1984. Anderson's initial title was "computer systems manager."

Shortly after arriving at Respondent, Anderson implemented the new MIS service request procedure. The purpose of the procedure was to prioritize user requests for modifications in an effort to control programming expenses. Petitioner was notified on August 28, 1984 to check with Anderson before any work expected to exceed four hours was performed. Grill interpreted the new procedure as a limit on the number of hours of work that Petitioner would receive from Respondent. This later would prompt Grill to increase the rates charged Respondent. However, according to Grill, Respondent would continue to receive a discounted rate because of the "special relationship" between Petitioner and Respondent.

The animosity grew when Anderson noted the mysterious appearance of Respondent's customer list on April 12, 1985 on an old printer at Respondent. In a telephone conversation that day concerning the list, Grill accused Anderson of making a "personal affront" to Grill and approaching the problem with a "bad attitude." According to a transcript of the call, Grill stated:

> All I was trying to do was to get something out of the way ahead of time so that when I go to Mr. Yago I can have it in my hand and say – this list that we have talked about before we are going down with you, we want to go down with it and see who is considered a *competitor* that we are not supposed to be talking to about *your software*. Something I do not have to do legally.

* * *

> We have a *gentleman's agreement* between us and that is what I am going on. Strictly *verbal contract* between me and him about how *his software* is going to be handled, who we are going to sell it to and what – there is nothing that stops me from putting in the . . . *Supply House Times* last week except my integrity and my *agreement* with Mr. Yago that I am not going to do such a thing without discussing it with him first. [Emphasis added.]

As late as May 4, 1987, Grill still thought it was necessary to seek advice and permission from Mr. Yago, Respondent's president, before completing an advertising mailer for some of the software.

In a letter to Mr. Yago dated March 4, 1989 but not mailed until March 8, 1991, Grill stated:

> As you know, Frank [Fraccastoro] and I have discussed and *agreed* on certain programs including but not limited to those regarding EMA purchasing, Lavalco's purchasing category groupings and the SPA report, which Results, Inc. will protect as confidential . . . . [Emphasis added.]

Ironically, even though Petitioner admits the existence of the oral agreement concerning EMA, Grill copyrighted it and sued Respondent for alleged infringement.

C. SUMMARY OF THE ARGUMENT

Issue 1

None of the considerations which govern this Honorable Court's review of cases on writs of certiorari is present. Simply stated, there are no special and important

reasons for granting the writ and reviewing this case. Petitioner has cited no conflict in the circuits, nor has Petitioner pointed to any unsettled issue of federal law or interpretation of such law which would justify review by this Court. Rather, it is clear that Petitioner filed this writ solely to gain another review of the trial court's factual findings by yet another federal court.

Issue 2

The trial court did not abuse its discretion in denying Petitioner's motion to compel. Petitioner never showed good cause for the Court to order production of all of the confidential programs and items on Respondent's computer. Also, Petitioner's total failure to introduce its programs (or modifications) into evidence made Respondent's post-relationship modifications totally irrelevant. In its motion to compel, Petitioner argued that the information sought was necessary to prove its damages. Its present theory, that a "line-by-line comparison" was necessary to establish copyright infringement, was never presented to the trial court in support of the motion to compel.

Issue 3

Petitioner is not entitled to statutory damages and attorney's fees. The trial court properly found that Respondent had the right or license to modify the programs further. The trial court's factual findings on this point are not clearly erroneous. In any event, Petitioner

did not prove that any program was modified by Respondent for the first time after Petitioner received its copyright certificates. Statutory damages and attorney's fees, therefore, are unavailable.

ARGUMENT

I. This Court Should Not Grant A Writ Of Certiorari In This Case

Rule 10 of the Rules of the Supreme Court of the United States provides in part that a "petition for writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10 further indicates that the character of reasons that will be considered by the court in evaluating a petition for writ of certiorari are:

> (a) When a United States court of appeals has rendered a decision in conflict with a decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted or usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

None of the above considerations is present in this case. Petitioner's Motion to Compel already has been reviewed by the magistrate judge, the district judge, and three judges of the court of appeals. There is no unique, novel or unsettled issue of law presented. There is no conflict in the circuits. Petitioner simply lost its case. Its motion for new trial was denied. The court of appeals later affirmed. The sole purpose of this Writ of Certiorari is to attempt to gain another review of the facts by another federal court. In other words, review by this Court of this case would be an unfortunate waste of this Court's time.

II. The Trial Court's Factual Findings Moot All Issues Concerning Denial Of The Motion To Compel

The trial court did not abuse its discretion in denying Petitioner's Motion to Compel. In a futile attempt to paint a negative image of Respondent, Petitioner argues that Petitioner produced the items sought by Respondent when Petitioner's president was deposed. Petition at 12. Petitioner's Brief further states that among the items produced was a tape of the programs in question in their current form.

Petitioner made this same misstatement to the district court and to the court of appeals. Both times, Lavalco had to set the record straight. Petitioner did *not* produce the programs sought by Lavalco when Petitioner's president was deposed. In discovery, Lavalco requested copies of all computer programs, subprograms, subroutines and computer tapes which were made, updated, or modified in any way during or after the time in which Petitioner performed work for Respondent. At the deposition of Petitioner's president, its counsel of record stated:

> MR. ALLISON: We just want a minute here to be sure that I'm not misleading you. Yes. With respect to Number 15. . . . *It is [Petitioner's] position that any work done after the relationship with [Respondent] terminated would not be produced.* That was work that has not been paid for and if we produce it now then that gives you, or your client, the access to my client's work that he hasn't been paid for. And so, with the exception of anything that's been modified or changed in any way after the time which he had a relationship with [Respondent], we have produced everything in there. That is it. Everything else, we have. [Emphasis added.]

It should be clear, therefore, that Petitioner *refused* to produce to Respondent the same materials it later sought in the Motion to Compel.

Petitioner also contends that "[s]ince the computer programs in question are at the heart of this litigation, they most certainly cannot fail the test of relevance." Petition at 11. Again, Petitioner misses the point. Unless

or until Petitioner introduced "his" (unidentified) modifications into evidence (which he did not), Respondent's present programs were irrelevant. Yet, Petitioner states:

> There was simply no way to prove (or disprove, for that matter) copyright infringement without a line by line comparison of the original programs and those then in use by [Respondent].

Petition at 14. It should seem obvious, even to Petitioner, that such a comparison was impossible **considering no attempt was made by Petitioner to introduce "his" programs (modifications) into evidence or identify them for the trial court.**

Petitioner's motion to compel did *not* assert that Petitioner needed Respondent's programs for a "line by line comparison" in order to prove copyright infringement; that new theory was asserted only *during* trial. In fact, in its Motion To Continue Or In The Alternative, To Bifurcate (filed on the eve of trial), Petitioner stated:

> 4.
>
> Petitioner has sought production of the programs in their present form, to enable it to ascertain the extent of the modifications and the dates the modifications were made, *in order to determine the amount of damages it has suffered as a result of Defendant's infringement*. [Emphasis added.]
>
> 5.
>
> Without the programs themselves, Petitioner must serve interrogatories on Defendant

to determine the extent of the damages. [Emphasis added.]

In any event, because of the District Court's ruling that Respondent has the right or license to modify further the programs on its computer and, therefore, Respondent has not committed copyright infringement, Petitioner's inability to prove damages is of no moment. Both the magistrate judge and the district judge considered the arguments of Petitioner and, after careful consideration, rejected them. Accordingly, there is nothing arbitrary or clearly unreasonable about the denial of Petitioner's motion to compel. *Mayo v. Tri-Bell Industries, Inc.*, 787 F.2d 1007, 1012 (5th Cir. 1986) ("Control of discovery is committed to the sound discretion of the trial court and its discovery rulings will be reversed only where they are arbitrary or clearly unreasonable.").

III. Petitioner Was Not Entitled To An Award Of Statutory Damages Because Petitioner Failed To Prove Its Case

Petitioner's statement in its Petition that Respondent admitted to copyright infringement at trial is a gross misstatement of the facts. Petition at i (Issue 2). Respondent did not admit infringement, nor did Petitioner prove infringement.

Because Grill failed to establish what modifications he made to BOSS (the original program package) and what original source code he authored, he necessarily could not prove infringement by Respondent. While it is true that Respondent has modified the programs on its

computer, that fact alone is not proof of copyright infringement.

Petitioner never could identify for the trial court which programs allegedly authored or modified by Petitioner were submitted for registration to the United States copyright office. In response to a discovery request by Lavalco to ascertain which programs were encompassed by the copyright registration certificates at issue, Petitioner's president (Grill) stated, in a letter dated January 10, 1992:

> I do not believe I kept a list of the program names selected for submission. I believe an attempt at reconstructing that list at this late date would introduce the possibility of error and tend to imply that only those programs were at issue.

Appendix at 9. Petitioner never even attempted to introduce the programs or Petitioner's modifications to the programs into evidence. (Apparently, Grill believed he merely could introduce copyright registration certificates, then move on to the damages portion of his case.) In fact, at trial, Petitioner sought to introduce an exhibit (Exhibit 18), which allegedly represented the *names* of the programs which were registered with the copyright office. Because Exhibit 18 consisted of the very compilation of data which Petitioner's president, in discovery response, stated could not be reconstructed without the possibility of error, the trial court determined that the exhibit was not admissible.

The district court further noted in its opinion that even if Exhibit 18 had been admitted, it would *not* assist that court in deciding the case, because the exhibit merely

was a listing of the *names* of the programs allegedly included in the copyright registrations. The exhibit provided the trial court with no guidance as to which programs the copyright registrations actually covered and what their contents were. Petitioner never identified at trial the modifications it claimed were copyrighted, and therefore, at issue in the lawsuit. Appendix at 10, fn.9.

Thus, the key question Petitioner never answered at trial was: "What particular modifications were copyrighted (by Petitioner) and are, thus, the subject of this lawsuit?" Appendix at 10. Even in its Petition to this Court, Petitioner still has failed to offer any excuse for its complete and total failure to introduce the object or source code representing the original modifications Petitioner claims were copyrighted.

More importantly, § 412(2) of the Copyright Act provides that neither statutory damages nor attorney's fees are available for any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless its registration is made within three months after the first publication of the work. *Mason v. Montgomery Data, Inc.*, 741 F.Supp. 1282, 1285 (S.D. Tex. 1990), *subsequent proceedings*, 765 F.Supp. 353 (S.D. Tex. 1991), *reversed on other grounds*, 967 F.2d 135, 142-144 (5th Cir. 1992). However, as in this case, where a work is not registered until *after* the alleged infringement, the copyright holder is not eligible for statutory damages or attorney's fees and is limited to actual damages and profits under § 504(b). Furthermore, where the alleged infringing activity commences prior to registration of a copyright, the copyright claimant may not

claim statutory damages for continued post-registration activity. *Mason*, 967 F.2d at 144.

Notwithstanding Petitioner's inexplicable failure to introduce into evidence the original source code which Petitioner claims it copyrighted, Petitioner's copyright infringement claim fails for yet an additional reason. The district court found that any modifications which may have been made by Lavalco were "made within the scope of Lavalco's license to modify these programs." Appendix at 12. The district court found, as a matter of fact, that "[Respondent's] license included the right to modify for [its] own use, programs placed or modified by [Petitioner] on [Respondent's] computer." Appendix at 13.

CONCLUSION

There is no conflict among the circuits, and there is absolutely nothing whatsoever in the instant Petition which requires this Court's attention. The district court ruled in Respondent's favor based upon its determination of the facts. The Fifth Circuit found no error and, therefore, affirmed. Nothing new is presented here. The Petition is devoid of merit, and it should be denied.

Dated this 28th day of June, 1994.

Respectfully submitted,

JOHN M. MADISON, JR.
MARK L. HORNSBY
WIENER, WEISS, MADISON & HOWELL
A PROFESSIONAL CORPORATION
Post Office Box 21990
Shreveport, Louisiana 71120-1990
Telephone: (318) 226-9100
Counsel for Respondent